Supreme Court, U.S.
FILED
JUN 17 1994
OFFICE OF THE CLERK

No. 93-1748

(3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LILLIAN SOLOMON, *et al.*,
Petitioners,

v.

RESOLUTION TRUST CORPORATION,
as Receiver for Nassau Savings and
Loan Association, F.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

6 pp

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Pursuant to Rule 15.7 of the Rules of this Court, petitioners respectfully submit this supplemental brief to discuss two new decisions of this Court that were not available when the petition was filed on May 4, 1994. Those decisions are *BFP* v. *RTC*, 62 U.S.L.W. 4359 (U.S. May 23, 1994), and *O'Melveny & Myers* v. *FDIC*, No. 93-489, slip op. (June 13, 1994). The decision of the Second Circuit below is in conflict with each of these subsequent decisions of this Court. Petitioners file this supplemental brief now so that the RTC has the opportunity in its response (now due on or before July 6, 1994) to address petitioners' arguments concerning these two new decisions, and so that the Court may consider petitioners' arguments at the same time that it reviews RTC's response.

The decision of the Second Circuit below is in conflict with this Court's subsequent decision in *BFP*. The opinion of the Court in *BFP* holds that a federal court may only interpret a federal statute to preempt state law "when the implication is unambiguous. But where the intent to override is doubtful, our federal system demands deference to long established traditions of state regulation." 62 U.S.L.W. at 4364. Specifically, "[t]o displace traditional State regulation" in the area of real property, "the federal statutory purpose must be 'clear and manifest.'" *Id.* at 4363 (quoting *English* v. *General Electric Co.*, 496 U.S. 72, 79 (1990)). Otherwise, the statute "will be construed to adopt, rather than to displace, preexisting state law." *BFP*, 62 U.S.L.W. at 4363. See also *id.* at 4362 ("Absent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its effect.").*

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* Although the statute at issue in *BFP* was the Bankruptcy Code, the requirements of *BFP* apply to statutory interpretation generally. *See* Pet. 15. Moreover, the Second Circuit would certainly take seriously the effect of *BFP* on the validity of its decision. In the decision below, the Second Circuit stated that 12 U.S.C. § 1821(e) "borrowed and adopted many of the provisions of the Bankruptcy Code dealing with a lessee's rights when the debtor-lessor rejects a lease contract. See S. Rep. No. 19 at 314 (12 U.S.C. § 1821(e) was 'closely modeled on parallel provisions of section 365 of the Bankruptcy Code.')." Pet. App. 22a. In a subsequent decision, *1185 Ave. of the Americas Assocs.* v. *RTC*, 1994 U.S. App. LEXIS 8732 (2d Cir. April 26, 1994), the Second Circuit emphasized that it will interpret the repudiation powers under the Bankruptcy Code and under 12 U.S.C. § 1821(e) to be parellel:

> [W]e note that Chapter 3 of the Bankruptcy Code provides a helpful analogy. Like a conservator or receiver of a failed thrift, a trustee in bankruptcy has the power to 'assume or reject any executory contract or unexpired lease of the debtor' within a limited time period (sixty days) following appointment. 11 U.S.C. § 365(a) & (d) (1988). Like the RTC, a trustee in bankruptcy may wear more than one hat. The trustee may first be appointed as a Chapter 11 trustee, which

As the petition demonstrated, there is no dispute, and this Court's precedents hold, that rent control statutes and regulations constitute traditional state regulation of real property. See Pet. 14-15 & n.7. The decision of the Second Circuit therefore committed fundamental error in not even attempting to demonstrate how the requirement, set forth in *BFP*, of a clear and manifest purpose—i.e., unambiguous intent—of Congress to preempt rent control laws can be found in 12 U.S.C. § 1821(e). Indeed, the Second Circuit did not even acknowledge the standard set forth in *BFP*, even though the district court expressly relied on that standard. See Pet. App. 36a-37a. Moreover, as the petition demonstrated, using the *BFP* standard, no clear and manifest purpose and unambiguous intent to displace state rent control law can be discerned or even contrived from 12 U.S.C. § 1821(e). See Pet. 14-28. The conflicts between *BFP* and the Second Circuit decision in both the governing standard and result are irreconcilable.

The Second Circuit's decision is also contradicted in three respects by this Court's subsequent decision in *O'Melveny*. First, *O'Melveny* holds that the phrase "rights . . . *of the insured depository institution*" in 12 U.S.C. § 1821(d)(2)(A)(i) means the rights of the savings and loan that "existed prior to receivership," *i.e.*, under state law. Slip op. at 6-7. The RTC's repudiation power under Section 1821(e)(1) extends only to "any contract or lease . . . *to which such institution is a party*." Accordingly, under *O'Melveny*, the language of Section 1821(e)(1) means that the repudiation power extends only to an obligation that, "*prior to receivership*," would be considered under applicable principles of state law to be imposed on the savings and loan by contract or lease. Slip op. at 6-7. Here, New York law plainly provides

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is analogous to a conservator. The Chapter 11 trustee eventually may be replaced by a Chapter 7 trustee, which is analogous to a receiver. *Id.* at *10.

that statutory tenancy obligations are *not* imposed by contract or lease, but rather by statute and regulation. See Pet. at 20-22.

Second, *O'Melveny* holds that "matters left unaddressed [by FIRREA] are presumably left subject to the disposition provided by state law." Slip op. at 6. Although FIRREA contains numerous definitions of words used in the statute, see 12 U.S.C. § 1813, FIRREA has left unaddressed what constitutes a "contract or lease." Under *O'Melveny*, state law therefore governs what is a "contract or lease." Contrary to *O'Melveny*, the Second Circuit did what Congress chose not to do—create a federal law definition for "contract or lease." See Pet. App. 13a.

Finally, and perhaps most fundamentally, *O'Melveny* rejected the government's argument that its desire for "more money" constitutes an interest that should influence judicial interpretation of the FDIC's or the RTC's powers. Slip op. at 9. Specifically, the Court held that "neither FIRREA nor the prior law sets forth any anticipated level for the [insurance] fund" and that "there is no federal policy that the fund should always win." *Id.* In contrast, the Second Circuit adopted RTC's "more money" arguments and expressly premised its interpretation of RTC's powers on its stated desire "to strengthen RTC's hand in remedying a national economic emergency." Pet. App. 23a.

Along with the reasons set forth in the petition, the conflicts between the Second Circuit's decision and this Court's decisions in *BFP* and *O'Melveny* warrant this Court's review. In the alternative, the petition should be granted, the decision below vacated, and the case remanded for reconsideration in light of *BFP* and *O'Melveny*. Certainly, *BFP* and *O'Melveny* might well affect the Second Circuit's interpretation and therefore these decisions should be addressed by that court before 93-year old Lillian Solomon, the other petitioners, and nu-

merous other rent-controlled tenants are irrevocably evicted from their homes.

Respectfully submitted,

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